CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

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ASSESSMENT PREPARATION

CHAPTER 10

ACTIVE LEARNING QUESTIONS

1. Do you think all defences should face the same onus of proof? If not, why not?

Most defences only face an evidential burden of proof (reasonable possibility). The exceptions are insanity/mental impairment, diminished responsibility and provocation (in Queensland only in the five jurisdictions in Australia that allow this defence) which place a legal burden of proof on the defence on the balance of probabilities. The reason for a legal onus of proof for insanity/mental impairment and diminished responsibility stems from the presumption of sanity in s 26 of the Codes.

> 26 Presumption of sanity
> Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

As to the legal onus on the defence for the partial defence to murder of provocation, when in 2010 the Queensland Government announced its intention to amend the partial defence of provocation to place the onus of proof on the defendant, in accordance with a recommendation in the Queensland Law Reform Commission's 2008 report, the then Attorney-General observed:

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> As the QLRC report stated, placing the onus upon the defendant strikes the right balance between the rights of the individual and the wider interests of the community.[1]

Thus, in Queensland only, the two partial defences to murder of provocation and diminished responsibility both require the defence to discharge a legal onus of proof on the balance of probabilities. Should the four other jurisdictions in Australia that allow the partial defence of provocation (NSW, SA, ACT and NT) follow Queensland's lead?

For the defence of accident, the watershed case of *Woolmington v DPP* [1935] AC 462 established that it is for the Crown to prove the defendant's guilt. Woolmington, who was estranged from his wife, stole a shotgun and cartridges from his employer, sawed off the barrel, threw it in a brook, and then bicycled over to his mother-in-law's house where he shot and killed his wife. Woolmington was charged with the wilful murder of his wife. Woolmington's version of events was that he did not intend to kill his wife, but rather he wanted her to return to him; to show his wife he was serious he threatened to kill himself if she did not come back to the marital home. By accident, the gun went off shooting his wife in the heart.

The trial judge directed the jury that the onus was on Woolmington to show that the shooting was accidental, and the subsequent appeal was dismissed by the Court of Criminal Appeal, who cited *Foster's Crown Law* (1762) as authority:

> In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, unless the contrary appeareth.[2]

The Attorney-General gave his fiat certifying that Woolmington's appeal involved a point of law of exceptional public importance, which brought the issue of the correctness of the above statement in *Foster's Crown Law* to the House of Lords. This was the background to Viscount Sankey's famous 'golden thread' speech:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution

[1] The Honourable Cameron Dick, Attorney-General, 'State Government to amend laws relating to accident and provocation', Ministerial Media Statement, 12 September 2010.

[2] Sir Michael Foster, *Foster's Crown Law* (1762) 255.

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> must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused.[3]

Thus, from 1935 onwards, it has been settled law that where an accused person raises the defence of accident, it is for the Crown to negative that possibility beyond reasonable doubt.

As has been pointed out in '*A guide to framing Commonwealth offences, civil penalties and enforcement powers*',[4] the Senate Scrutiny of Bills Committee 'usually comments adversely on a bill which places the onus on an accused person to disprove one or more of the elements of the offence with which he or she is charged'.[5] However, whilst the matter being within the defendant's knowledge has not been considered sufficient justification, the Senate Committee 'is most inclined to support reversal where the defence consists of pointing to the defendant's state of belief'.[6]

The question here is whether there should be further statutory exceptions to an evidential burden of proof only when a defence is raised. For example, should there be a legal onus on the defence to prove any or all defences such as self-defence, emergency, duress, coercion, honest claim of right and mistake of fact? The argument in favour of further exceptions is that the evidential onus is too low, and that therefore the Crown is put too readily to not only proving all the elements of the offence but also negativing any of these defences beyond reasonable doubt.

This in turn raises the possibility that it is the standard of the evidential onus that needs to be considered rather than a reversal of the onus of proof. Also, as discussed in question 3 below, whether in conjunction with a higher bar for the evidential onus, the tests for these defences should be solely objective to (a) reflect the ordinary person test as a proxy for community standards, and to (b) remove jury confusion in being required to apply mixed objective and subjective tests.

2. Is the concept of a hierarchy of defences, with justification defences such as self-defence at the top, useful for assessing criminal responsibility?

Chalmers and Leverick have suggested that 'there is a hierarchy of defences in terms of those that reflect most favourably on the defendant'[7] on top of which sits the justification defence of self-

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[3] *Woolmington v DPP* [1935] AC 462, 481.

[4] *A guide to framing Commonwealth offences, civil penalties and enforcement powers,* Australian Government, February 2004.

[5] Ibid 29.

[6] Ibid.

[7] J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217, 245.

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defence followed by the excuses of duress and necessity. Provocation straddles both justification and excuse.[8] Baron makes the point that justifications and excuses are not quite on a par, morally. 'Given a choice between having some action of mine deemed justified and having it deemed excused, I would rather it be deemed justified. Most people would presumably share this preference.'[9]

The Irish Law Reform Commission in its 2009 Report 'Defences in Criminal Law' (LRC 95 – 2009) discussed the distinction between justification defences and excuse defences at 13–14 [1.13]–[1.16].

> 1.13 There is no clear analytical basis on which to place in hierarchical order all the defences that operate within the criminal law. It has, however, been suggested that justification-based defences are seen as the most preferable type of defence to claim, followed by excuse-based defences and then lack of capacity defences (Gardner 'The Mark of Responsibility' (2003) 23 OJLS 157-71; Gardner 'The gist of excuses' (1998) 1 *Buffalo Criminal Law Review* 575-98). This approach is based on the view that it is preferable to be seen as having been justified in one's actions as opposed to being 'merely' excused. It has also been argued that it is more acceptable to be excused for an action than not having the capacity to make a reasoned judgement at all; although in the case of a defence based on the accused being 7 years of age, it is at least arguable that an acquittal on that ground is likely to be regarded as being at least on a par with an adult's acquittal based on an excusatory defence.
>
> 1.14 Justification defences and excuse defences are similar in the sense that the *actus reus* and *mens rea* for the offence has been established but they are distinct in other important respects.
>
> 1.15 Justification-based defences imply that the conduct of the accused was the right thing to do – it was acceptable – even though it satisfied the definition of the offence. By contrast, excuse-based defences deem the conduct of the accused as unacceptable and wrong, but there is a reason why the accused should not be blamed – he or she should be excused or forgiven.
>
> 1.16 Ormerod provides two useful hypothetical scenarios to illustrate the difference between a justification based defence and excuse based defence:
> 'A nine year old child who deliberately kills is excused but no one would say he is justified. In contrast, nearly everyone would approve of the conduct of a man who saves the lives of his family despite committing a criminal act of criminal damage, say, or self defence.' (Ormerod *Smith & Hogan Criminal Law* (11th ed Oxford, 2005) at 248.)

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[8] See, for example, sections 54 to 56 of the *Coroners and Justice Act 2009* (UK), by virtue of which the defence of provocation was abolished and substituted with a new partial defence entitled 'Loss of Control'. This marks a shift from one of excuse to one of justification.

[9] M. Baron, 'Justifications and Excuses' (2005) 2 *Ohio State Journal of Criminal Law* 387, 389.

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For present purposes, the Irish Law Reform Commission concluded at 15 [1.21] that 'there is no consensus as to what category each defence fits into and, more importantly, there seems to be little agreement as to what difference, if any, such classification has in practical terms', citing Ormerod *Smith & Hogan Criminal Law* (11th edn Oxford, 2005) at 248.

> 1.22 There are conflicting views as to whether it really matters whether a defence is a justification or an excuse. Robinson notes that there is little difference so far as the acquittal of the person relying on the defence is concerned. (Robinson 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 Col LR 199.) The defendant is not concerned whether the defence is labelled as a justification or an excuse, but rather is only concerned with whether the defence frees them of criminal liability.

Nevertheless, 'the distinction is useful and can be insightful in terms of viewing how society views particular defences in comparison to others' (at 16 [1.23]).

3. Do you think the jury is likely to be confused by mixed subjective and objective tests?

Many defences employ mixed subjective and objective tests such as self-defence, duress, emergency, and provocation against a murder charge. The question to be considered is whether the tests should be solely objective as measured against whether the ordinary person would reasonably have acted in the same way. Two defences will be considered to illustrate the distinction (1) self-defence, and (2) provocation against a murder charge.

(1) Self-defence

The self-defence provision in s 248(4) of the *Criminal Code 1913* (WA) is typical of the self-defence provisions found in Australian jurisdictions.

> (4) A person's harmful act is done in self-defence if —
>
> (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
>
> (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
>
> (c) there are reasonable grounds for those beliefs.

It can be seen that s 248(4)(b) contains a similar subjective component to the equivalent Queensland section in 271(2) of the *Criminal Code 1899* (Qld) which uses the words 'believes, on reasonable grounds', by virtue of the qualification of a reasonable response in s 248(4)(b) which

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reads 'in the circumstances as the person believes them to be'. This is consistent with the *Model Criminal Code* as expressed in s 10.4(2) of the *Criminal Code 1995* (Cth) which states that 'the conduct is a reasonable response in the circumstances as he or she perceives them'. However, both the beliefs in s 248(a) and (b) are qualified by s 248(c), which requires both beliefs to be held on reasonable grounds. The combination of the subjective and objective tests contained in s 248(4) is discussed in *Goodwyn v State of Western Australia* [2013] WASCA 141, at [170]–[174], per Mazza JA below.

Mazza JA

> [170] Section 248(4) contains a number of subjective and objective components.
>
> [171] The belief set out in s 248(4)(a) is plainly subjective. The relevant belief is that the harmful act done by the accused is necessary to defend the accused or another person from a harmful act … The word 'necessary' must relate to something; in other words, 'necessary to do what?' It is clear from the statutory text that the answer to this question is: 'necessary to defend the person or another person from a harmful act'.
>
> [172] Section 248(4)(b) requires that the accused's harmful act be a reasonable response in the circumstances as the accused believes them to be. What the fact finder is required to do is:
>
> (a) determine what, in the accused's mind, were the circumstances surrounding the doing of the harmful act by the accused; and
>
> (b) having regard to the circumstances as the accused believed them to be, decide if the accused's harmful act was a reasonable response.
>
> [173] Section 248(4)(b) is thus a combination of objective and subjective considerations. The objective consideration is whether the accused's harmful act was a reasonable response, but that has to be viewed from the perspective of the accused's subjective beliefs as to the circumstances.
>
> [174] I turn to s 248(4)(c). That subsection requires that there be reasonable grounds for those 'beliefs'. The 'beliefs' (plural) referred to in s 248(4)(c) must refer to the beliefs contained in 248(4)(a) and (b). Section 248(4)(c) thus imports an objective assessment of each of the subjective beliefs in (a) and (b). This means that there must be reasonable grounds for the accused's belief that the act is necessary to defend the accused or another person from a harmful act, and there must be reasonable grounds for the accused's belief of the circumstances surrounding the doing of his or her harmful act.

Instead of the complexities of combining subjective and objective tests as found in s 248(4) of the *Criminal Code 1913* (WA) above, the sub-section could be rewritten to include only an objective test as follows:

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> A person carries out conduct in self-defence only if:
>
> (a) the person *reasonably* believes the conduct is necessary:
>
> (i) to defend himself or herself or another person; and
>
> (b) the conduct is a reasonable response in that it is *reasonably* proportional in the circumstances as he or she *reasonably* perceives them. (Words in italics reflect a solely objective test.)

The jury would thus be instructed to assess the defendant's conduct solely from the perspective of whether the ordinary person would reasonably have acted in the same way. This objective test would be easier for the jury to apply than a combined subjective and objective test, although arguably not as fair to the accused.

(2) Partial defence of provocation to murder

The two part subjective and objective test for provocation derived from *Stingel v The Queen* (1990) 171 CLR 312, and judicially determined to be contained in s 304(1) of the *Criminal Code 1899* (Qld), is conceptually confused, complex and difficult for juries to understand and apply.[10] The two part test is statutorily captured in s 158(2) of the *Criminal Code 1983* (NT).

> (a) the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased towards or affecting the defendant; and
>
> (b) the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.

The legal meaning of provocation consists of conduct which (a) causes the defendant to lose control (subjective); and (b) could cause an ordinary person to lose self-control and react in the manner in which the defendant reacted (objective).

Thus, there is a two part subjective and objective test for provocation. The first subjective part accepts the relevance of the defendant's characteristics for the purpose of assessing the gravity of the deceased's conduct. Under the second objective part, these subjective considerations are excluded, except for age, when judging the effect of this conduct on the powers of self-control of the ordinary person. The question then becomes whether the ordinary person faced by that degree of provocation could (not would) have killed the deceased.

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[10] Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 26–35. There is an inherent confusion built into a test that seeks to distinguish between the gravity of the provocation from the perspective of the accused on the one hand, and an objective assessment of the reaction of the accused on the other hand.

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Professor Yeo has pointed out why jurors find the distinction between the subjective and objective components of the test so difficult.

> [The test] bears no conceivable relationship with the underlying rationales of the defence of provocation … The defence has been variously regarded as premised upon the contributory fault of the victim and, alternatively, upon the fact that the accused was not fully in control of his or her behaviour when the homicide was committed. Neither of these premises requires the distinction to be made between the characteristics of the accused affecting the gravity of the provocation from those concerned with the power of self-control.[11]

One possible change is that the test for provocation should be solely objective and all reference to the gravity of the offence should be removed.[12]

> The defence of provocation applies only to a serious wrong, defined as a fear of serious violence towards the defendant or another, and if the conduct of the deceased was such as could have induced an ordinary person of the defendant's age and of ordinary temperament, defined as ordinary tolerance and self-restraint, to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.

It can be seen that under the proposed objective test above the sole test is judged from the standard of 'an ordinary person of the defendant's age and of ordinary temperament'. Again, the objective test would be simpler for the jury to apply than the two part subjective and objective test, but would be clearly less favourable to the accused.

CONCLUSION

A position advocating a single objective test for defences can be justified on two grounds. First, on the ground of the inherent confusion in instructing juries based on a two part subjective and objective test, and secondly, because of the danger of the subjective test overwhelming the objective component leading in turn to the victim's family being left with a sense of justice denied.

4. Where do you think the balance lies with mental impairment defences as regards the level of criminal responsibility versus the protection of the community?

Unlike the old insanity defence where the defendant pleading insanity faced a lifetime at Her Majesty's pleasure in an asylum for the criminally insane, today a successful defence of insanity will lead to a person acquitted of a serious crime on the grounds of insanity being liable to supervision

[11] Stanley Yeo, *Unrestrained Killings and the Law* (1998), 61.

[12] For such an argument, see Andrew Hemming, 'Provocation: A Totally Flawed Defence that has No Place in Australian Criminal Law Irrespective of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1–44.

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or being released into the community. The partial defence to murder of diminished responsibility is only available in Queensland, New South Wales, the Australian Capital Territory and the Northern Territory. As a successful plea of diminished responsibility leads to a manslaughter conviction rather than a murder conviction, the defendant will be released into the community earlier in those jurisdictions which allow this partial defence to murder. Has the closure of asylums for the criminally insane and the greater prevalence in the community of mentally disturbed people who have committed serious crimes increased the dangers to the community? Or, are there sufficient checks and balances in the mental health system to allay such fears?

In Queensland, this question of the balance goes to the making of a forensic order (insanity) or sentencing (diminished responsibility). Under s 288(2) of the *Mental Health Act 2000* (Qld), if the Mental Health Court decides a person charged with an indictable offence was of unsound mind when the alleged offence was committed:

> (2) The court may make an order in accordance with this division (a forensic order (Mental Health Court) or a forensic order (Mental Health Court—Disability)) for a person mentioned in subsection (1)(a) or (b) that the person be detained for involuntary treatment or care.

The decision to make a forensic order under s 288(2) reflects a balancing act under s 288(4) below.

> (4) In deciding whether to make an order under subsection (2), the court must have regard to the following—
>
> (a) the seriousness of the offence;
> (b) the person's treatment or care needs;
> (c) the protection of the community.

The effect of the Mental Health Court making a forensic order under s 288 is such that the order detains the defendant to either an authorised mental health service (AMHS) for treatment as an inpatient or in the community, or to the Forensic Disability Service for care.

If the Mental Health Court decides that a person charged with murder was of diminished responsibility at the time, then s 282 of the *Mental Health Act 2000* (Qld) applies. No forensic order is made.

> 282 Particular proceedings discontinued—diminished responsibility
>
> If the Mental Health Court decides a person charged with the offence of murder was of diminished responsibility when the alleged offence was committed—
>
> (a) proceedings against the person for the offence of murder are discontinued.

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Under s 384 of the *Mental Health Act 2000* (Qld), the Mental Health Court has the necessary powers to exercise its jurisdiction, which includes sentencing.

> 384 Powers
>
> (1) The Mental Health Court may do all things necessary or convenient to be done for, or in relation to, exercising its jurisdiction.

The sentencing decision of the Mental Health Court is subject to appeal to the Court of Appeal by the Attorney-General under s 334(b) of the *Mental Health Act 2000* (Qld). Cases such as *R v Neumann; ex parte A-G (Qld)* [2005] QCA 362, and *R v Beacham* [2006] QCA 268 highlight the challenge of finding the right balance between the criminal responsibility of a defendant with a mental illness and protection of the community. A person found to have diminished responsibility close to insanity is less culpable but potentially more dangerous in the future than someone found to have a far lower threshold of diminished responsibility whose culpability is closer to murder but is less likely to kill again: see *Veen v The Queen (No 2)* (1988) 164 CLR 465.

In *R v Neumann; ex parte A-G (Qld)*,[13] the Court of Appeal took the opportunity to review the principles for sentencing an offender found guilty of manslaughter on the grounds of diminished responsibility. The case is of special interest as there was a marked disagreement between members of the Court of Appeal as to the merits of relying on the mental health system.

In effect, countervailing principles are in play as on the one hand 'low intelligence and diminished responsibility falling short of insanity will (if otherwise relevant) operate on sentence as a mitigating factor',[14] whilst on the other hand mental abnormality may be an aggravating factor in sentencing. The well-known passage from Brennan J's judgment in *Channon v The Queen* illustrates the point.

> Psychiatric abnormality falling short of insanity is frequently found to be a cause of, or a factor contributing to, criminal conduct. The sentencing of an offender in cases of that kind is inevitably difficult. The difficulty arises in part because the factors which affect the sentence give differing significance to an offender's psychiatric abnormality. An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from

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[13] *R v Neumann; ex parte A-G (Qld*) [2005] QCA 362. In this case, an appeal by the Attorney-General against a 12 year sentence for the attempted murder of a two year old child with a bayonet was dismissed. The Court split 2:1, with the dissenting judge, Jerrard JA, favouring a sentence of life imprisonment.

[14] *R v Neumann; ex parte A-G (Qld*) [2005] QCA 362 [27] (Fryberg J); *R v Kiltie* (1974) 9 SASR 453 (Bray CJ), cited with approval in *R v Dunn* [1994] QCA 147.

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> society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe.[15]

In addition to the above countervailing sentencing principles, there is also the tension between the criminal justice system and the mental health system.[16] Judges take different views as to confidence in psychiatric rehabilitation and the risk posed to the community as demonstrated in the contrasting passages in *R v Neumann*.[17]

Jerrard JA was in dissent and held this unflattering view of the mental health system in Queensland as it pertained to Mr Neumann who was subsequently diagnosed as suffering from schizophrenia:

> [T]here were cases in which the mental condition of a convicted person would render that person dangerous if at large, and in some cases sentences of life imprisonment might have to be imposed to ensure that society was protected. I have the view that this is such a case, because of the absence of any evidence about Mr Neumann's future mental health or how he could (ever) be returned safely to the general community. There is nothing in the material before this Court to suggest confidence in psychiatric rehabilitation or that, if he can be successfully managed on medication, he would take it if unsupervised in the community … There was just not enough put before the sentencing judge or this Court to justify confidence that reliance on the mental health system would provide the plainly necessary protection for the community.[18]

Fryberg J gave the leading judgment for the majority (McPherson JA agreeing) and his Honour held a far more optimistic view of the mental health system than his brother judge, Jerrard JA, as the following passage illustrates:

> In short, appropriate mechanisms exist under the Act to deal with any danger which the respondent might pose to the community when the time comes for his release. Schizophrenia can often be treated and controlled. It is worth noting that in May the Mental Health Court assessed him as suitable for treatment in the community under escort.[19]

Just one year after *R v Neumann* was decided, the case of *R v Beacham* came before the Court of Appeal,[20] and again the judges differed in their respective confidences in the mental health system.

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[15] *Channon v The Queen* (1978) 20 ALR 1, 4–5.

[16] *R v Beacham* [2006] QCA 268 [3] (McMurdo P).

[17] *R v Neumann; ex parte A-G (Qld*) [2005] QCA 362.

[18] *R v Neumann; ex parte A-G (Qld*) [2005] QCA 362 [10]–[11].

[19] *R v Neumann; ex parte A-G (Qld*) [2005] QCA 362; *R v Beacham* [2006] QCA 268.

[20] *R v Beacham* [2006] QCA 268.

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Mr Beacham appealed his sentence of 13 years imprisonment ordered by the Mental Health Court. The majority (McMurdo P and Jerrard JA) allowed the appeal and substituted a term of 12 years imprisonment. Jerrard JA gave the leading judgment and gave this summation of the situation at the time of the applicant's future release:

> If at large in the community, and mentally ill, Mr Beacham can be made an involuntary patient in a mental health service. … The danger for the community will come from his not taking medication prescribed for him, and his consumption of unprescribed drugs. The latter is a risk for many prisoners; a very large percentage of the recidivist armed robbers who are sentenced in Australian courts commit those offences because of addiction to drugs.[21]

Jones J dissented and gave the following appraisal of the present regime of mental health services and its ability to protect the community as his reason for finding no error in sentencing:

> The Court has to assess the risk to the community by having regard to the circumstances prevailing at the time of sentencing. A relevant fact is the provision of Mental Health services in the community and the court's assessment of their effectiveness in meeting the risk as perceived by the Court. The only protection provided by the present regime under the *Mental Health Act* at the end of the applicant's term of imprisonment, unless he is further detained, is limited to his being made an involuntary patient pursuant to Chapter 4 of the *Mental Health Act*.[22]

The two cases above of *R v Neumann* and *R v Beacham* bear testimony to the difficulties and uncertainties that sometimes present themselves when courts have to make sentencing judgments many years in advance of the applicant's release with all the attendant unknowns as to the mental health regime then operating and the mental state of the applicant.[23] Sitting alongside the court balancing liability against mitigation is the vexed question of protecting the community from an offender who is mentally abnormal.

Insanity in the Supreme Court of Queensland and Western Australia

Where a defence of insanity is successful, a special verdict acquitting the person charged on the ground of insanity or unsoundness of mind applies: s 647 *Criminal Code* (Qld), and s 146 *Criminal Procedure Act 2004* (WA). Under s 647(1) 'the court is required to order the person to be kept in strict custody, in such place and in such manner as the court thinks fit, until the person is dealt with

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[21] *R v Beacham* [2006] QCA 268 [37].

[22] *R v Beacham* [2006] QCA 268 [54].

[23] *R v Neumann; ex parte A-G (Qld)* [2005] QCA 362; *R v Beacham* [2006] QCA 268 [54].

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pursuant to the *Mental Health Act 2000* (Qld). Under s 149(1): 'If a court acquits an accused of a charge on account of unsoundness of mind, the court must deal with the accused under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).'

Under s 21 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) below, if the accused is acquitted on account of unsoundness of mind (insanity), then the court must make a custody order if the offence is a Schedule 1 offence. Schedule 1 offences include murder, manslaughter, unlawful assault causing death and attempted murder. The general effect of a custody order is set out in s 24 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) below.

> 21 Powers of superior courts
>
> If an accused is acquitted by a superior court or on appeal of an offence on account of unsoundness of mind, the court —
>
> (a) if the offence is a Schedule 1 offence — must make a custody order in respect of the accused.
>
> 24 General effect of custody order
>
> (1) A mentally impaired accused is to be detained in an authorised hospital, a declared place, a detention centre or a prison, as determined by the Board, until released by an order of the Governor.

The 'Board' referred to in s 24 above is the Mentally Impaired Accused Review Board, whose functions are set out is s 44(2) of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) as: 'do all things necessary or convenient to be done for or in connection with, or as incidental to, the performance of its functions.' One of the key functions is to recommend the release of a mentally impaired accused to the Governor under s 35 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

> 35 Governor may release mentally impaired accused
>
> (1) The Governor may at any time order that a mentally impaired accused be released by making a release order.
>
> (2) A release order is an order that on a release date specified in the order the accused is to be released —
>
> (a) unconditionally; or
>
> (b) on conditions determined by the Governor.

Thus, the protection of the community is largely determined by the quality of the recommendations made by the Mentally Impaired Accused Review Board to the Governor. A similar role is undertaken by the Mental Health Court in Queensland as discussed earlier, which is supplemented by a Mental Health Review Tribunal. For example, under s 437(c) of the *Mental Health Act 2000* (Qld), one of the

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functions of the Mental Health Review Tribunal is to review the mental condition of forensic patients and forensic disability clients.

CONCLUSION

The defence of insanity is less common than the partial defence of diminished responsibility in the case of murder because total incapacity against any one of the three capacities is required. Diminished responsibility as a defence is not available in Western Australia and it remains a controversial defence.[24] Irrespective of the nature of the mental impairment defence, the protection of the community is largely in the hands of those responsible in the mental health system for assessing the mental fitness of a mentally impaired accused. This in turn is determined by the amount of resources a government is prepared to commit to ensuring the mental health system functions effectively.

5. Do you support a separate Mental Health Court?

The justification for a Mental Health Court is that a specialist court is a more efficient and cost effective method of dealing with persons accused of criminal acts who have a mental impairment. By allowing such persons to be dealt with separately from the mainstream criminal justice system, the focus is upon their mental condition and a determination of (a) whether they are fit to stand trial, and (b) to be dealt with by the Mental Health Court rather than the District Court or the Supreme Court. Queensland has a Mental Health Court.

In summary, in Queensland the Mental Health Court decides whether a person charged with a criminal offence has a 'mental health defence'.

- whether the person was of unsound mind at the time of the offence (suffering mental illness or intellectual disability to such a degree as to not be able to be held responsible for their actions) or

- not fit for trial (unable to stand trial because of mental illness or intellectual disability).

Other jurisdictions are considering following Queensland's example. For example, Western Australia is at the time of writing piloting a Mental Health Court diversion program in the Perth Magistrates' Court and the Perth Children's Court, which is being jointly implemented by the Mental Health Commission and the Department of the Attorney-General.

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[24] See Andrew Hemming, 'It's Time to Abolish Diminished Responsibility, the Coach and Horses' Defence Through Criminal Responsibility For Murder' (2008) 10 *University of Notre Dame Law Review* 1.

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The *Mental Health Act 2000* (Qld) primarily deals with involuntary assessment and treatment of people with a mental illness, which is defined in s 12 of the Act below.

> 12 What is mental illness
> (1) Mental illness is a condition characterised by a clinically significant disturbance of thought, mood, perception or memory.

A wide definition of who may make a request for an assessment of a person's mental state is found in s 17 below, which effectively means that a defendant's solicitor is able to request such an application having seen the evidence against his or her client.

> 17 Who may make request for assessment
> A request for assessment for a person must be made by someone who—
> (a) is an adult; and
> (b) reasonably believes the person has a mental illness of a nature, or to an extent, that involuntary assessment is necessary; and
> (c) has observed the person within 3 days before making the request.

For present purposes, the key component of the Act under examination covers people with a mental illness charged with a criminal offence and the determination of their mental state and detention before and after a finding of (a) insanity within the meaning of s 27 of the *Criminal Code 1899* (Qld), and (b) diminished responsibility within the meaning of s 304A of the *Criminal Code 1899* (Qld).

Under the *Mental Health Act* (Qld), a Mental Health Court is established.[25] The Mental Health Court is constituted by a Supreme Court judge who is assisted by two experienced psychiatrists who advise the court on medical or psychiatric matters.[26] The powers of the Mental Health Court under the Act are to do 'all things necessary or convenient to be done for, or in relation to, exercising its jurisdiction'.[27] Under the Act, the Attorney-General can appeal against a decision of the Mental Health Court, which is heard by the Court of Appeal.[28]

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[25] *Mental Health Act 2000* (Qld) s 381(1).

[26] *Mental Health Act 2000* (Qld) ss 382(1), (2).

[27] *Mental Health Act 2000* (Qld) s 384(1).

[28] *Mental Health Act 2000* (Qld) s 334(b). The use of an alternative forum other than the courts to hear diminished responsibility cases, such as in Queensland, was rejected by the New South Wales Law Reform Commission who considered the defence ought primarily to be left to the jury within the trial process and saw no reason why an exception should be made to allow the defence to be heard by a specialist body. The Commission noted there was provision in NSW for an election for trial by judge alone. See New South Wales Law Reform Commission (NSWLRC), *Partial Defences to Murder: Diminished Responsibility*, Report

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The New South Wales Law Reform Commission in its Report No 135 entitled 'People with cognitive and mental health impairments in the criminal justice system: Diversion' published in June 2012 gave this summary assessment of Mental Health Courts at xxiii [0.53 and 0.54].

> While mental health courts are not without critics, many evaluations are positive and show, for example, reductions in re-arrest rates, incarceration rates, and associated costs.
>
> Mental health courts or specialist lists have been established in Australia. Specialist courts or lists are either established or proposed in Queensland, South Australia, Tasmania, Western Australia and Victoria. Evaluations have generally been positive, though evidence of reduction in reoffending is limited.

CONCLUSION

In principle, Mental Health Courts appear to offer a positive alternative mechanism to the mainstream criminal justice system for a mentally impaired accused. In practice, in the absence of convincing evidence in support of such Courts, much will depend on the expertise of the Courts and the resources allocated to them by governments.

PROBLEM QUESTION 1

ASSUME THE FOLLOWING FACTS

Nicole lives with her daughter Grace, aged twelve. Nicole has had a very deprived upbringing. Her mother overdosed on heroin and her father has spent the majority of his life in prison. A succession of foster homes culminated in a sexual assault when Nicole was Grace's age. At school, Nicole had remedial learning difficulties as a result of some physical damage to her brain, and as a young adult she developed a compulsive/obsessive neurotic personality disorder.

Nicole works part-time in the local supermarket and has arranged her hours so that she can take Grace to and from school. Nicole is obsessed with Grace's safety.

One afternoon, after a series of unfortunate events, Nicole arrives fifteen minutes late to collect Grace at school. Already agitated at being late, Nicole has a panic attack on finding Grace is nowhere to be seen.

Nicole frantically asks other children if they have seen Grace. A classmate of Grace's tells Nicole that she saw Grace leave with another girl in their class, Monica, and Monica's father, Thomas. She points in the direction all three headed.

No 82 (1997) 3.84; and for trial by judge alone later cases such as *R v Enderbury* [2002] NSWSC 535 and *R v Tatarinova* [2004] NSWSC 676.

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Nicole races after the trio and rounds a corner just in time to see Grace, Monica and Thomas enter the garden of a nearby house. As Nicole breathlessly catches up and follows them into the garden, she sees Thomas with an arm around a tearful Grace trying to comfort her. Nicole spots some garden shears in a wheelbarrow.

Nicole gives the following statement to the police. 'At this moment, it was as though some force possessed me. I watched myself advance into the garden and stab Thomas with the shears. It was like it wasn't me. It was like it was someone in one of those action movies, James Bond or someone. I just couldn't stand anyone interfering with my daughter, just like my foster father did to me. A few minutes later, I found myself sobbing, and Thomas was lying dead on the ground.'

It transpires that an emotional Grace, upon believing her mother had forgotten to pick her up from school, had pleaded with Thomas to be allowed to go with Monica so that Thomas could ring Nicole's mobile phone from his house.

There is considerable disagreement in the expert psychiatric evidence as to Nicole's mental condition. The Crown has some evidence that Nicole's ability to control her actions was not significantly diminished on the afternoon in question. The defence has some evidence that Nicole went into a disassociated state as a result of her childhood experiences and the stress created by Nicole's fear of what might have happened to Grace.

Discuss Nicole's criminal responsibility for the death of Thomas.

THE ISSUES

This question raises three issues: (1) the partial defence to murder of diminished responsibility; (2) the defence of insanity; and (3) whether Nicole comes within the ambit of either non-insane or insane automatism.

THE RELEVANT LAW

The focus of this question is on whether Nicole has a mental health defence. The fact that Nicole killed Thomas is not in doubt. Given that there is 'considerable disagreement in the expert psychiatric evidence as to Nicole's mental condition', all the mental health defences are open in the factual matrix. This of course only applies in Queensland, as Western Australia does not allow the partial defence to murder of diminished responsibility.

(1) The partial defence to murder of diminished responsibility in Queensland only

Under s 304A(1) of the *Criminal Code* (Qld):

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising

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> from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.

The evidentiary onus of proof lies with the defendant to show that there was a reasonable possibility of the defence. The legal onus of proof also lies with the defendant on the balance of probabilities. In determining whether the defence of diminished responsibility is proved, the jury must not only consider the medical evidence before it, but 'the whole facts and circumstances of the case' (*Walton* [1973] AC 788, 793).

The first element of the defence is that at the time the defendant suffered from abnormality of mind, being 'a state of mind so different from that of ordinary human beings that a reasonable person would describe it as abnormal' (Queensland Supreme & District Courts Benchbook, 88.2). This includes the ability to perceive physical acts and matters, to rationally judge whether an act is right or wrong and to use will-power to control acts rationally (*Rose* [1961] AC 496).

Factors causing or contributing to an abnormality of mind which will not be considered are intoxication (*R v Miers* [1985] 2 Qd R 138, 141); prejudice, anger, temper, jealousy, or in general, base natural emotions (*R v Ralph* [1962] Qd R. 262, 288); and attitudes or opinions based on religious, political or partisan influences (*R v Whitworth* [1989] 1 Qd R 437, 446). Furthermore, it must be something more than loss of self-control due to anger, poor judgment or distress (Queensland Supreme & District Courts Benchbook, 88.2). Whether or not the defendant had the requisite abnormality of mind for the defence is for the jury to determine on a case by case basis, although the jury cannot be perverse in the face of uncontradicted medical evidence (*R v Whitworth* [1989] 1 Qd R 437, 447).

A wide range of conditions have been held to fall within the ambit of abnormality of mind which is a far broader concept than a 'disease of the mind' in the defence of mental impairment (insanity). These conditions range from severe depression (*R v Chayna* (1993), 66 A Crim R 178, 184) to post-traumatic stress disorder (*R v Nielsen* [1990] 47 A Crim R 269, 271) and personality disorders (*McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [121]).

The second element of the defence of diminished responsibility is that the abnormality of mind must arise from a specified cause or prescribed factor (*R v Whitworth* [1989] 1 Qd R 437, 443). This requires a consideration of the three possible aspects of abnormality of mind set out in s 304A above: (1) a condition of arrested or retarded development of mind; or (2) inherent causes; or (3) induced by disease or injury.

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First, a condition of arrested or retarded development of mind takes into account 'intellectual disabilities or organic brain damage'[29] and has a similar meaning to 'natural mental infirmity' under s 27 *Criminal Code* (Qld) for the defence of insanity.[30]

Secondly, for there to be an inherent cause for the abnormality of mind to arise, it must be one that is 'natural to the person's mind and originating from within it' (*R v Whitworth* [1989] 1 Qd R 437, 454). The term 'inherent' imports a degree of permanency (*R v McGarvie* (1986) 5 NSWLR 270, 272).

The third factor to be considered is whether the abnormality of mind was induced by disease or injury. This has been interpreted broadly to include all forms of physical deterioration, such as epilepsy (*R v Dick* [1966] Qd R 301) or delirium from fever (*R v Whitworth* [1989] 1 Qd R 437, 450). The word 'disease' includes disturbed or deranged bodily function and the word 'injury' refers to physical damage (*R v De Souza* (1997) 95 A Crim R 1, 23-24). Significantly, the abnormality of mind need not be a permanent feature (*Tumanako* (1992) 64 A Crim R 149, 162).

The third element is 'substantially impaired'. Section 304A(1) of the *Criminal Code* (Qld) above requires that there be must be an abnormality of mind that causes substantial impairment to the person's capacity to understand what the person is doing; or the person's capacity to control the person's actions; or the person's capacity to know that the person ought not to do the act or make the omission.

The early English cases spoke of substantial impairment being a matter of degree,[31] and whether a condition is serious enough to constitute a substantial impairment of criminal responsibility is a question of fact for the jury applying its common sense to all the circumstances of the case.[32] In *R v Lloyd,*[33] substantial was held to be less than total but more than trivial or minimal impairment. In Australia, this scale found favour with Hart J in *R v Biess*.[34]

The defence will not be successful in circumstances where the defendant's capacity to understand what he or she is doing, or capacity to control his or her actions, or capacity to know he or she

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[29] S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2nd edn, 2005) 286.

[30] J. Clough and C. Mulhern, *Criminal Law* (Butterworths, 2nd edn, 2004) 384.

[31] *R v Byrne* [1960] 2 QB 396, 404 (Lord Parker CJ). The defendant was described by expert witnesses as a dangerous sexual psychopath, responsible for a number of killings of young women. Byrne knew what he was doing but successfully claimed the defence as his psychopathy made it difficult for him to refrain from killing. However, Byrne did receive a life sentence because of the danger he represented to the public.

[32] *R v Simcox* [1964] Crim R 402, 403.

[33] *R v Lloyd* [1967] 1 QB 175, 176.

[34] *R v Biess* [1967] Qd R 470, 475.

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ought not do the act or make the admission is substantially impaired due to intoxication (*R v Miers* [1985] 2 Qd R 138, 141).

(2) The defence of insanity

A presumption of sanity[35] which may be displaced by the defence of insanity is found in s 27 of both Codes. The wording of each section is slightly different, and s 1 of the *Criminal Code* (WA) does define both mental impairment and mental illness whereas the *Criminal Code* (Qld) does not, but the law on insanity is similar in both Codes. Section 27(1) of the *Criminal Code* (Qld) provides that:

> A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission.

Section 27(1) of the *Criminal Code* (WA) provides that:

> A person is not criminally responsible for an act or omission on account of unsoundness of mind if at the time of doing the act or making the omission he is in such a state of mental impairment as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

Both the evidential and legal onus proof lies with the defendant. In effect, the defence must show on the balance of probabilities that the person was totally incapacitated against one of the three capacities.

Definition of insanity in Queensland

The requisite state of mental disease or natural mental infirmity to establish a defence of insanity must be such as 'to deprive the person of capacity to understand what the person is doing, or capacity to control the person's actions, or capacity to know that the person ought not to do the act or make the omission' (*Criminal Code 1899* (Qld), s 27(1); *Re Pitt* [2000] QCA 30, [2] (de Jersey CJ, Davies and Thomas JJA).

The terms 'mental disease or natural mental infirmity' are not defined under the *Criminal Code* (Qld), unlike the *Criminal Code* (WA), but have been held to be an abnormal mental state or a temporary or permanent derangement of the mind in which there is any disorder or derangement of the understanding (*R v Foy* [1960] Qd R 225, 243).

Definition of insanity in Western Australia

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[35] *Criminal Code 1899* (Qld), s 26; *Criminal Code 1913* (WA), s 26. See also *Perkins v The Queen* [1983] WAR 184, 188 (Burt J) and *R v Falconer* (1990) 171 CLR 30.

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Section 1 of the *Criminal Code* (WA) defines mental impairment as 'intellectual disability, mental illness, brain damage or senility'. Mental illness is also defined as 'an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli'.

Meaning of 'capacity' in Queensland and Western Australia

Total incapacity against any one of the three capacities on the balance of probabilities is sufficient for the defence of insanity: (1) Capacity to understand conduct (act or omission); (2) Capacity to control conduct; or (3) Capacity to understand conduct was wrong.

(1) Capacity to understand conduct (act or omission)

Under s 27(1) of both the *Criminal Code* (Qld) and the *Criminal Code* (WA), the defendant who claims insanity must demonstrate that he or she was in such a state of mental disease, natural mental infirmity or mental impairment that he or she did not understand the physical nature of the act or omission done at that time. Dixon J in *R v Porter* above gave the following example:

> In a case where a man intentionally destroys life he may have so little capacity for understanding the nature of life and the destruction of life, that to him it is no more than breaking a twig or destroying an inanimate object.[36]

In relation to a charge of murder, the requisite nature and quality of the conduct 'refers to the physical character of the act, in this case, a capacity to know or understand the significance of the act of killing and of the shooting by which it was done'.[37] It does not relate to an understanding of the moral quality of the act, as such a requirement would duplicate the third limb of the defence.[38]

(2) Capacity to control conduct

The incapacity to control one's action or omission, sometimes known as insane automatism, must leave that person 'incapable of exercising the power of determination or choice … [doing] an act independently of the exercise of his will'.[39]

McMillian J in *R v Moore* (1908) 10 WALR 64 construed s 27 of the *Criminal Code* (WA) as follows:

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[36] *R v Porter* (1933) 55 CLR 182, 188 (Dixon J).

[37] *Willgoss v The Queen* (1960) 105 CLR 295, 300 (Dixon CJ, McTiernan, Fullagar, Menzies, and Windeyer JJ).

[38] *Sodeman v The King* (1936) 55 CLR 192, 215–216 (Dixon J).

[39] Queensland Parliamentary Papers, Samuel Griffith, notes on the Draft Code for Queensland, CA 89–1897, 14.

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> It treats as insane certain persons who under the old law would not have been treated as insane. It accepts the medical theory of uncontrollable impulse, and treats people who are insane to the extent that they have not the capacity to control their actions, whether from mental disease or natural mental infirmity, as being persons who are irresponsible.[40]

'Uncontrollable impulse' in itself is not sufficient for the defence unless stemming from mental disease 'which brings about or is associated with incapacity to know the nature and quality of an act or to know that it is wrong'.[41] In *Falconer*, the High Court held that an accused is not entitled to a qualified acquittal 'unless he proves not only that he was deprived of his capacity to control his actions but also that he did not know the nature and quality of his act or that it was wrong'.[42] This narrows the operation of the volitional arm of the insanity defence to unconscious involuntary conduct due to mental disease (insane automatism), which is subsumed under the first limb of lack of capacity to control conduct.

There are few cases (*Wray*[43], *Lavell*[44]) where the volitional arm of the insanity defence has been solely relied upon without reference to the two cognitive arms of the insanity defence. In *Lavell*, a trial conducted by judge alone, EM Heenan J found the accused, diagnosed as suffering from a mental illness (paranoid schizophrenia), 'was in such a state of mental impairment as to deprive him of the capacity to control his actions and that, therefore, he is not criminally responsible for his conduct by reason of his insanity'.[45]

(3) Capacity to understand conduct was wrong

It is unclear from the words of the Codes whether this requirement is a reference to the law or to morality. In England, the defendant must not know that he was doing something legally wrong,[46] whereas in Australia it may include a consideration of 'the everyday standards of reasonable people'.[47] There must be evidence that the defendant was unable to reason 'with some degree of

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[40] *R v Moore* (1908) 10 WALR 64, 66.

[41] *Sodeman v The King* (1936) 55 CLR 192, 203–204 (Latham CJ).

[42] *R v Falconer* (1990) 171 CLR 30, 48–49 (Mason CJ, Brennan and McHugh JJ).

[43] *Wray v The King* (1930) 33 WALR 67.

[44] *R v Lavell* [2002] WASC 200.

[45] *R v Lavell* [2002] WASC 200 [51] (EM Heenan J).

[46] *R v Windle* [1952] 2 QB 826, 832 (Goddard L).

[47] *R v Porter* (1933) 55 CLR 182, 189–190 (Dixon J).

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calmness' as to the wrongfulness of the act nor comprehend the nature or significance of the wrongful act.[48]

The Queensland Supreme and District Courts Benchbook explains the third arm of the insanity defence in these terms:

> The capacity 'to know that the person ought not to do the act' is the capacity for moral judgment: *Porter* (1933) 55 CLR 182, 189 approved in *Stapleton*, 367. See also *Willgoss* (1960) 105 CLR 295, 301. A defendant will lack that capacity if he is unable to reason about the moral character of the acts in question or to make a moral judgment about it.[49]

In *Willgoss v The Queen* (1960) 105 CLR 295, a Victorian case where only the two cognitive arms of the insanity defence are available, the High Court observed that counsel wisely placed the weight of the defence on a lack of capacity to know that he was doing what was wrong, rather than a capacity to know or understand the significance of the act of killing (at 300). This is because mistaking the nature of a physical act is more difficult to prove, such as believing a person is a mannequin. In refusing special leave to appeal, the High Court said: 'the alleged incapacity of the prisoner to comprehend the wrongness of the act seems to have depended on other considerations than a capacity to reason about the matter with a moderate degree of sense and composure' (at 301).

(3) Whether Nicole comes within the ambit of either sane or insane automatism

Automatism goes to the *actus reus* and not the *mens rea*. The focus is upon voluntariness and not the formation of intention. The first limb of s 23, which deals with the independent exercise of the person's will in s 23(1)(a) (Qld) and s 23A(2) (WA), covers the requirement that the act or omission must be voluntary. An example of an involuntary act would be a spasm, a reflex action, or an act performed during sleep.

There is a presumption that the relevant act was willed or voluntary: *R v Falconer* (1990) 171 CLR 30 at 40 (per Mason CJ, Brennan and McHugh JJ). The defendant faces an evidential onus to show that the act was involuntary: *R v Youssef* (1990) 50 A Crim R 1 at 3 (per Hunt J). The first limb of s 23 has no applicability where the person is voluntarily intoxicated: see *R v Kusu* [1981] Qd R 136. Where the defence satisfies the evidential onus in claiming an act done in a state of non-insane automatism (defendant not suffering from a disease of the mind and not conscious of the nature of the act), the Crown must prove beyond reasonable doubt that the relevant act was a willed and voluntary one: *R v Falconer* (1990) 171 CLR 30 at 60 (per Deane and Dawson JJ).

A state of automatism was first recognised at common law by King CJ in *R v Radford* (1985) 42 SASR 266, 274-275, where his Honour distinguished between a 'disease of the mind' or mental illness, and a temporary disorder or disturbance of an otherwise healthy mind caused by external factors. The latter is known as non-insane automatism and if not negated by the Crown leads to a complete acquittal. King CJ's statement of the common law was approved by the High Court in the Western Australian case of *R v Falconer* (1990) 171 CLR 30.

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[48] *R v Stapleton* (1953) 86 CLR 358, 367 (Dixon CJ, Webb and Kitto JJ).

[49] Queensland Supreme & District Courts Benchbook, 78.4.

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Where there is evidence of an incapacity to control conduct, the preference will be for sane automatism and a defence under s 23(1)(a) (Qld) or 23A(2) (WA), which if successful leads to a complete acquittal. Sane automatism has a very narrow window for a defendant for the same reason as the incapacity to control conduct is rarely used in isolation from the other two arms of the insanity defence: there is a need to buttress the 'automaton' state with medical evidence, which in turn pushes the defence towards insane automatism.

In *R v Falconer* (1990) 171 CLR 30, the majority (Deane, Dawson, Toohey and Gaudron JJ) set out the steps where the jury is asked to consider both non-insane automatism and insanity as follows at 31:

> If the evidence requires a jury to consider both non-insane automatism and insanity, the jury should first ask itself whether the Crown has disproved non-insane automatism beyond reasonable doubt. If the Crown has failed to do so, the accused is entitled to unqualified acquittal. If the Crown has disproved non-insane automatism beyond reasonable doubt, the jury should then ask whether the accused has proved, a disease of the mind or natural mental infirmity within the meaning of s. 27 on the balance of probabilities. If he or she has, the jury should acquit on the ground that the accused was of unsound mind. If not, the jury should convict if the other elements of the offence have been proved beyond reasonable doubt.

Nevertheless, as Deane and Dawson JJ at 62–63 pointed out, where the evidence would support a verdict under s 27, there is no reason why the Crown should not be able to rely upon it as an alternative to conviction.

> 'It is only realistic to recognise that, if there is evidence of insanity, the prosecution is entitled to rely upon it even if it is resisted by the defence' (at 62).

Thus, if the defence raises expert evidence on automatism, there is a narrow window for sane automatism and a complete acquittal.

PUTTING THE FACTS INTO THE LAW

Tactically, defence counsel would have to choose, based on the evidence, which defence to rely upon in court. However, in a hypothetical legal problem context it is necessary to canvas all the options that are open to the defence. The salient medical evidence is as follows:

> At school, Nicole had remedial learning difficulties as a result of some physical damage to her brain, and as a young adult she developed a compulsive/obsessive neurotic personality disorder.
>
> Nicole gives the following statement to the police. 'At this moment, it was as though some force possessed me. I watched myself advance into the garden and stab Thomas with the shears. It was like it wasn't me. It was like it was someone in one of those action movies, James Bond or someone. I just couldn't stand anyone interfering with my daughter, just like

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> my foster father did to me. A few minutes later, I found myself sobbing, and Thomas was lying dead on the ground.'
>
> There is considerable disagreement in the expert psychiatric evidence as to Nicole's mental condition. The Crown has some evidence that Nicole's ability to control her actions was not significantly diminished on the afternoon in question. The defence has some evidence that Nicole went into a disassociated state as a result of her childhood experiences and the stress created by Nicole's fear of what might have happened to Grace.

(1) The partial defence to murder of diminished responsibility in Queensland only

This defence is relevant only if Nicole is charged with murder. In a real case, Nicole may plead guilty to manslaughter and then wait to see if the Crown will accept such a plea. On the assumption the Crown presses ahead with a charge of murder, the legal onus is upon Nicole to prove on the balance of probabilities the elements of s 304(1) of the *Criminal Code 1899* (Qld) above.

The first element is that Nicole suffered from an abnormality of mind. A wide range of conditions have been held to fall within the ambit of abnormality of mind which is a far broader concept than a 'disease of the mind' in the defence of mental impairment (insanity), and which includes personality disorders (*McDermott v The Director of Mental Health; ex parte A-G (Qld)* [2007] QCA 51 [121]). On the facts, Nicole is suffering from a compulsive/obsessive neurotic personality disorder, and thus would appear to satisfy the first element of having suffered from an abnormality of mind at the time she stabbed Thomas.

The second element of the defence of diminished responsibility is that the abnormality of mind must arise from a specified cause or prescribed factor. On the facts, the most relevant factor is a condition of arrested or retarded development of mind which takes into account 'intellectual disabilities or organic brain damage'. Nicole would appear to satisfy the second limb of the defence.

The third element is 'substantially impaired' against one of the three capacities in s 304A(1) of the *Criminal Code* (Qld). Here the most likely option is the capacity to know that the person ought not to do the act, given that 'the Crown has some evidence that Nicole's ability to control her actions was not significantly diminished on the afternoon in question'. Whether a condition is serious enough to constitute a substantial impairment of criminal responsibility is a question of fact for the jury applying its common sense to all the circumstances of the case. In *R v Biess* [1967] Qd R 470, 475 Hart J held that 'substantial' was less than total but more than trivial or minimal impairment. On the facts, Nicole would appear to come within the ambit of such a test.

Thus, on the above analysis, Nicole would appear to be suffering from diminished responsibility on the balance of probabilities, and therefore be convicted of manslaughter rather than murder under s 304(2) of the *Criminal Code* (Qld).

> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

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However, Nicole would still likely be facing the prospect of a lengthy term of imprisonment for manslaughter. The alternatives are (1) a plea of insanity, or (2) a plea of non-insane automatism. A plea of insanity avoids a conviction but leaves open the possibility of an indefinite period of detention as an involuntary patient. A successful plea of non-insane automatism leads to a complete acquittal, but is a very narrow legal window to pass through and failure risks a conviction for murder.

(2) The defence of insanity

The use of the defence of insanity is uncommon for three reasons: (1) the person must be totally deprived of one of the capacities; (2) the defence has to prove this incapacity on the balance of probabilities; and (3) the special verdict means the person will be dealt with pursuant to the *Mental Health Act 2000* (Qld) or under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

In order to come within the defence of insanity, Nicole must first satisfy the requisite state of mental disease or natural mental infirmity (Qld), or unsoundness of mind and a state of mental impairment (WA). Essentially, this means an abnormal mental state or an underlying pathological infirmity of the mind.

On the facts, while Nicole has some physical damage to her brain which might bring her within the definition of 'mental impairment' under s 1 of the *Criminal Code* (WA), 'the Crown has some evidence that Nicole's ability to control her actions was not significantly diminished on the afternoon in question'. This leaves either (1) Capacity to understand conduct (act or omission); or (2) Capacity to understand conduct was wrong. The former requires that Nicole did not understand the physical nature of the act of stabbing Thomas, while the latter requires that Nicole was unable to reason about the moral character of the act of stabbing Thomas. It is doubtful whether Nicole was totally deprived of either of these two capacities.

Thus, it is unlikely that Nicole would fall within the defence of insanity.

(3) Whether Nicole comes within the ambit of either non-insane or insane automatism

Nicole is relying on s 23(1)(a) Qld or s 23A(2) WA which absolve a person from criminal responsibility if the act or omission occurs independently of the will.

Nicole's statement to the police represents the classic 'red cloud' scenario of standing out from herself in a state of automatism. For all the reasons that Nicole may be successful with the partial defence of diminished responsibility discussed above, Nicole may have difficulty arguing non-insane automatism given the test of 'a temporary disorder or disturbance of an otherwise healthy mind caused by external factors' (*Radford*).

On the one hand Nicole has 'some physical damage to her brain, and as a young adult she developed a compulsive/obsessive neurotic personality disorder' while on the other hand there is 'some

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evidence that Nicole went into a disassociated state as a result of her childhood experiences and the stress created by Nicole's fear of what might have happened to Grace'. The difficulty for Nicole is that if she did go into a disassociated state, was her mind 'otherwise healthy'?

Assuming Nicole satisfies the evidential burden, then the Crown is required to disprove non-insane automatism beyond reasonable doubt. Following the process identified in *R v Falconer* (1990) 171 CLR 30, at 31, if the Crown has failed to do so, Nicole is entitled to unqualified acquittal. If the Crown has disproved non-insane automatism beyond reasonable doubt, the jury should then ask whether Nicole has proved, a disease of the mind or natural mental infirmity within the meaning of s 27 on the balance of probabilities. If Nicole has, the jury should acquit on the ground that Nicole was of unsound mind. If not, the jury should convict if the other elements of the offence have been proved beyond reasonable doubt.

On the above analysis, Nicole would likely be convicted of murder if she relied on non-insane automatism, as the Crown would be able to negative non-insane automatism and Nicole would be unable to prove insanity or insane automatism.

CONCLUSION

Nicole is likely to be successful in proving the partial defence of diminished responsibility on the balance of probabilities, and thereby reduce murder to manslaughter. Nicole would be unlikely to prove insanity on the balance of probabilities. The Crown would likely negative non-insane automatism, and Nicole would likely fail to establish insane automatism.

PROBLEM QUESTION 2

Lucas has been having an affair with Meredith for the past nine months. Meredith is still married to Ralph who is a notorious underworld figure involved in drug dealing and reputed to have 'made his bones' [to kill a person for membership in a criminal gang] on many occasions. Ralph is rumoured to be armed at all times, and has just been released from prison after serving three years for causing serious harm by 'kneecapping' an associate suspected of being a police informer.

The affair between Lucas and Meredith began while Ralph was in prison and Meredith did not reveal her connection with Ralph until just before Ralph's release from prison. Lucas is terrified that Ralph will find out about the affair. Meredith invites Lucas to her house with the assurance that Ralph is interstate on business. Lucas reluctantly accepts Meredith's invitation deciding this was the appropriate time to tell Meredith their affair had to end.

When Lucas arrived to be warmly embraced by Meredith, who was wearing a very revealing dress, all of Lucas's intentions of ending their affair evaporated. The pair had partly consumed a bottle of

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champagne and had started to become very amorous on the couch, when the door opened to reveal a scowling and fierce looking Ralph.

With a chilling and icy detachment, Ralph tells his wife: 'You, I'll deal with later.' Then turning to Lucas: 'First, I need to teach lover-boy here a lesson he'll never forget.' Lucas pleads with Ralph but Ralph simply shakes his head and slowly reaches into the inside pocket of his jacket.

Lucas, believing that Ralph was reaching for a gun, grabbed the bottle of champagne and smashes it into Ralph's face. Ralph collapses and strikes his head on a heavy metal table. Ralph is killed instantly.

Assuming Lucas is charged with murder, advise Lucas as to availability of self-defence.

Would your answer differ if it transpires that Lucas is mistaken as to Ralph's being armed with a gun and in fact Ralph had neither a weapon on his person nor in the house?

How would your answer differ on the availability of self-defence for Meredith if, instead of Ralph surprising the pair of lovers, Ralph had found out about the affair from an associate and told Meredith: 'You, I'll deal with later.' After which statement Ralph draws a bath. Meredith then takes pre-emptive action by picking up Ralph's gun, conveniently left on the dressing table, and empties the contents of the chamber (six bullets) into Ralph's torso at point blank range as Ralph reclines in the bath.

THE ISSUES

This question raises three issues: (1) the availability of self-defence; (2) self-defence and mistake of fact; and (3) self-defence and a pre-emptive strike.

Although Lucas and Meredith had partly consumed a bottle of champagne, the issue of intoxication is not dealt with here.

THE RELEVANT LAW

(1) The availability of self-defence

The main self-defence provisions available in Queensland are found under ss 271–272 of the *Criminal Code* (Qld). Queensland is unusual in still distinguishing between self-defence against unprovoked assault (s 271) and provoked assault (s 272). Under s 271(2), in circumstances where the assault by the assailant upon the person was enough to cause reasonable apprehension of death or grievous bodily harm and the person believes on reasonable grounds that he or she cannot otherwise prevent the assault, then the person may use such force as necessary for defence, even if it results in death or grievous bodily harm. The critical words in s 271(2) are the person 'believes on reasonable grounds', which combines a subjective test (belief) with an objective test (reasonable grounds), and is consistent with the common law.

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Zecevic v DPP (Vic) (1987) 162 CLR 645 is the leading common law case on self-defence. Wilson, Dawson and Toohey JJ at 661 framed the critical question as follows: 'It is whether the accused believed upon reasonable grounds that it was necessary to do what he did.'

In Western Australia, the main self-defence provision is s 248 of the *Criminal Code* (WA). Section 248(4) sets out the test for self-defence which states:

> (4) A person's harmful act is done in self-defence if —
>
> (a) the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and
>
> (b) the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and
>
> (c) there are reasonable grounds for those beliefs.

It can be seen that s 248(4)(b) contains a similar subjective component to the equivalent Queensland section in 271(2) which uses the words 'believes, on reasonable grounds', by virtue of the qualification of a reasonable response in s 248(4)(b) which reads 'in the circumstances as the person believes them to be'. However, both the beliefs in s 248(a) and (b) are qualified by s 248(c), which requires both beliefs to be held on reasonable grounds.

Once the evidentiary onus has been satisfied and the issue of self-defence is raised by the facts, the prosecution must establish, either that the accused did not believe on reasonable grounds that the force was necessary in self-defence, or that there were no reasonable grounds for such a belief. If the prosecution fails to prove either of these, the accused must be acquitted. In *R v Dziduch* (1990) 47 A Crim R 378, at 380, Hunt J stated that 'the Crown must eliminate any reasonable possibility that the accused was acting in self-defence'.

In Queensland, the 'trigger' for the self-defensive act is assault, being an unlawful application of force causing injury or personal discomfort: *Criminal Code 1899* (Qld), s 245(2) and 246. Threats will amount to an assault, so long as there is an actual or apparent ability to carry out the threat: *Hall v Fonceca* [1983] WAR 309 [20] (Smith and Kennedy JJ).

In Western Australia, the expression 'harmful act' is used in s 248(4), which encompasses offences against the person such as assaults, homicide, endangering life or health, sexual offences and threats. Furthermore, the harmful act need not be imminent: *Criminal Code 1913* (WA), s 248(4)(a). The inclusion of lack of immediacy statutorily adopts the position taken by the Northern Territory Court of Criminal Appeal in *R v Secretary* (1996) 5 NTLR 96.

The person must have reasonable grounds for the belief that the act is necessary to defend the person from grievous bodily harm or death (*Criminal Code 1899* (Qld) ss 271 (2) and 272) or a harmful act (*Criminal Code 1913* (WA) s 248 (4)). The existence of a belief is a 'critical or decisive

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factor' in determining whether the defendant's actions were a reasonable response: *R v Gray* (1998) 98 A Crim R 589, 592-595 (McPherson JA). A reasonable belief does not necessarily refer to a belief held by a reasonable person[50] and requires a consideration of any intellectual impairment or mental disorder suffered by the defendant to determine if the belief was reasonable.[51] The defendant's belief about the 'prowess or the aggressive disposition' of the victim may assist in determining if the defendant had the requisite belief,[52] although '[b]ecause each case will turn upon its own particular facts and circumstances, little is to be gained by a comparative analysis of the different facts and circumstances of individual cases'.[53]

The words used in s 271(2) (Qld) and s 248(4)(a) and (c) (WA) are similar: 'believes, on reasonable grounds' in Qld, and (a) 'believes the act is necessary' coupled with (c) 'there are reasonable grounds for those beliefs' in WA.

For Western Australia, Buss JA in *Goodwyn v State of Western Australia* [2013] WASCA 141 at [95] summarised the four elements of self-defence in s 248(4), with its combination of subjective and objective tests, which are relevant both to the reasonable grounds of belief and the reasonableness of the response or necessity, as follows:

> First, the accused (subjectively) believes the harmful act is necessary to defend the accused or another person from a harmful act, including a harmful act that is not imminent (s 248(4)(a)). Secondly, the accused's harmful act is a reasonable (objective) response by the accused in the circumstances as the accused (subjectively) believes them to be (s 248(4)(b)). Thirdly, there are reasonable (objective) grounds for the accused's (subjective) belief that the harmful act is necessary to defend the accused or another person from a harmful act, including a harmful act that is not imminent (s 248(4)(a) read with s 248(4)(c)). Fourthly, there are reasonable (objective) grounds for the accused's (subjective) belief as to the circumstances (s 248(4)(b) read with s 248(4)(c)).

As to whether the response was reasonably necessary (Qld) or a reasonable response (WA), in circumstances where a person uses force in self-defence in response to an unprovoked and unlawful assault, an objective consideration of all the circumstances and facts is required to determine whether the force used in self-defence was a reasonable response.[54] This may include whether or not the defendant retreated from the victim to avoid the assault.[55]

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[50] *R v Julian* (1998) A Crim R 430, 433-434 (Dowsett J).

[51] *R v Mrzljak* [2004] QCA 420 [53] (Williams JA).

[52] *R v Masters* (1983) 24 A Crim R 65, 67 (Thomas J).

[53] *Heinje v State of Western Australia* [2010] WASCA 86 at [51] (Martin CJ).

[54] *R v Hagarty* [2001] QCA 558 [34] (Williams J).

[55] *Randle v The Queen* (1995) 15 WAR 26, 37 (Malcolm CJ).

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The term 'necessary' in itself suggests that the response should be reasonable.[56] In *R v Gray* (1998) 98 A Crim R 589, at 592–593, McPherson JA considered the application of the term 'reasonably necessary' to self-defence:

> In the case of s 271(2), it is, at least in part, subjective. The defender must believe that what he is doing is the only way he can save himself or someone else from the assault. He must hold that belief 'on reasonable grounds'; but it is the existence of an actual belief to that effect that is the critical or decisive factor. There is no additional requirement that the force used to save himself or someone else must also be, objectively speaking, 'necessary' for the defence.

(2) Self-defence and mistake of fact

Mistake in the context of self-defence can take three forms: '(1) A mistake about the existence or nature of an attack or about the identity of the attacker; (2) a mistake about the necessity of a particular response; and (3) a mistake about the reasonableness of a particular response.'[57]

On the interaction between mistake and self-defence, it would appear that a person can rely on the self-defence provisions where belief is relevant (s 271(2) and s 267 (Qld), and s 248 and s 244 (WA)) without resorting to s 24 of the Codes which deals with mistake of fact. In *R v Muratovic* (1967) Qd R 15, at 19, Gibbs J stated that:

> If the accused person had an honest and reasonable, although mistaken, belief that the force used was necessary for defence, he is no more criminally responsible than if that force was in fact necessary for defence – s 24 of the Code.

In *Marwey v The Queen* (1977) 138 CLR 630, at 637, Barwick CJ, whilst otherwise agreeing with the above passage from the judgment of Gibbs J, doubted the need to refer to s 24 Mistake of fact.

> I would not find it necessary, in order to reach the conclusion expressed by his Honour [Gibbs J], to have resort to the provisions of s 24. I take leave to question whether the necessity of doing the fatal act can properly be said to be a state of fact for the purpose of applying s 24. Resort might, of course, be had to that section if the reasonable grounds for the necessary belief included the accused's erroneous understanding of some fact which, had it been as the accused understood, would have supported the existence of reasonable grounds.

As to an erroneous understanding of some fact, in *Lean v The Queen* (1989) 1 WAR 348, the appellant had been convicted of inflicting grievous bodily harm, and claimed that he had acted in the belief that he had been slashed with a knife, that his throat had been cut and that he was going to die. The Court of Criminal Appeal held that s 24 of the *Criminal Code* (WA), relating to the defence

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[56] *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 662 (Wilson, Dawson and Toohey JJ).

[57] Eric Colvin, John McKechnie and Jodie O'Leary, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 7th edn, 2015) 314 [14.34].

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of honest and reasonable but mistaken belief in a state of things, had no relevance to the defence of self-defence under ss 248 or 249 of the Code [now repealed and replaced by the current s 248] except to the extent that it may be relevant to the existence of reasonable grounds. However, as Colvin et al have noted, 'it is difficult to see any role for s 24 in relation to provisions which have a defence based on reasonable belief in the necessity of force rather than actual necessity'.[58]

For in both Codes, self-defence focuses upon whether the person's belief that the force used is necessary is based on reasonable grounds. Thus, mistake comes under the umbrella of reasonable grounds, and self-defence remains available provided any mistake was reasonable. If the belief, even if mistaken, was based on reasonable grounds, the self-defence will itself have been reasonable. In *R v Gray* (1998) 98 A Crim R 589, at 594, McPherson JA having cited the passages from *R v Muratovic* and *Marwey v The Queen* above, observed: 'It is, of course, essential … that there be reasonable grounds for that belief; but that is not the same as saying that doing the act that causes death or grievous bodily harm must be objectively necessary.'

(3) Self-defence and a pre-emptive strike

In Western Australia, the harmful act need not be imminent: *Criminal Code 1913* (WA), s 248(4)(a). The inclusion of lack of immediacy statutorily adopts the position taken by the Northern Territory Court of Criminal Appeal in *R v Secretary* (1996) 5 NTLR 96.

In *Secretary*, the defendant had suffered long term abuse from her partner. The deceased uttered threats immediately prior to falling asleep which caused the accused to fear for her life. The accused shot the deceased while he was asleep. The question for the court was whether a threat could be 'on foot' while the person who made the threat was asleep. A majority of the court answered in the affirmative, in holding that an assault endures so long as the threat and ability (whether actual or apparent) to effect the threat when the time comes, coexist.

While there is no specific mention of imminence in s 271 or s 272 in the *Criminal Code* (Qld), in *R v MacKenzie* [2002] 1 Qd R 410 the court followed *R v Secretary* (1996) 5 NTLR 96 in holding that it was wrong to think that self-defence was only available in response to an immediate physical threat.

More generally, where 'battered women' have taken pre-emptive action to kill their abusers, expert evidence is admissible to explain that the abuse bears on the reasonableness of the belief as to the nature of the acts necessary to avoid the risk of death or grievous bodily harm. In *Osland v The Queen* (1998) 197 CLR 316 at [56] Gaudron and Gummow JJ observed:

> So, too, expert evidence of heightened arousal or awareness of danger may be directly relevant to self-defence, particularly to the question whether the battered woman believed that she was at risk of death or serious bodily harm and that her actions were necessary to avoid that risk. And, of course, the history of the particular relationship may bear on the reasonableness of that belief.

[58] Ibid, 314–315 [14.37].

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The Queensland District and Supreme Court Benchbook No 86A.2 reflects the above High Court authority, and states that expert evidence may be adduced which is relevant to the defendant's belief as to the danger she faced.

> In 'Battered Woman Syndrome' cases, expert evidence may be adduced as to the defendant's heightened awareness of danger, and the jury should be directed to its relevance to the defendant's belief as to the risk of grievous bodily harm or death. Equally, the actual history of the relationship may require direction as going to the existence of reasonable grounds for any belief; *Osland* (1998) 197 CLR 316 at 337.

Self-defence is a complete defence, and if the Crown cannot negative self-defence then the outcome is an acquittal. In Queensland, s 304B of the *Criminal Code* (Qld) provides for the partial defence of killing for preservation in an abusive domestic relationship. It is available in circumstances where the defendant has unlawfully killed a person with whom they are in a domestic relationship in which there has been a history of serious domestic violence within the relationship. If the defence is successful in the sense the Crown cannot negative it beyond reasonable doubt, then the murder charge is reduced to manslaughter. It is a form of excessive self-defence.

The defendant must have believed that the killing of the victim was necessary to prevent his or her death or serious injury caused by the victim: *Criminal Code 1899* (Qld), s 304B (1)(b). Evidence of the belief held by the defendant may therefore be admitted by referring to the history of domestic violence within the relationship between the defendant and the victim.

The objective test of reasonableness for the belief qualifies the subjective test:

> By referencing the abusive relationship to the reasonableness of the belief, it is intended that the provision extends considerations of reasonableness to behaviours and reactions to the relationship having regard to the circumstances of that relationship and how victims of domestic violence behave generally in such relationships in the context of the accused's actions.[59]

The objective test therefore restricts the application of the defence so that a murder conviction can only be reduced to manslaughter if the belief held by the defendant was reasonable.

PUTTING THE FACTS INTO THE LAW

(1) The availability of self-defence for Lucas

On the facts, we are told that Lucas is 'terrified that Ralph will find out about the affair' and that he is aware of Ralph's reputation for violence. Surprised in the act of making love to Ralph's wife, Lucas hears Ralph tell him he will be taught 'a lesson he'll never forget'. Lucas pleads with Ralph who shakes his head and slowly reaches into the inside pocket of his jacket.

[59] Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009, Notes on Provisions, 10.

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Threats will amount to an assault (Qld) or a harmful act (WA), so long as there is an actual or apparent ability to carry out the threat: *Hall v Fonceca* [1983] WAR 309 [20] (Smith and Kennedy JJ).

Lucas needs to satisfy the subjective and objective tests contained within s 271(2) (Qld) and s 248(4) (WA) to come within self-defence. As Lucas has not provoked Ralph, s 271(2) is the operative sub-section in Queensland. The first part of the test is that Lucas must have reasonable grounds for the belief that his act of hitting Ralph with the champagne bottle was necessary to defend himself from grievous bodily harm or death (*Criminal Code 1899* (Qld) s 271 (2) or a harmful act (*Criminal Code 1913* (WA) s 248 (4)).

Here, Lucas's belief about the 'prowess or the aggressive disposition' of Ralph may assist in determining if Lucas had the requisite belief: *R v Masters* (1983) 24 A Crim R 65, 67 (Thomas J).

The second part of the test is focused on whether Lucas's response was reasonably necessary (Qld) or a reasonable response (WA). This requires an objective consideration of all the circumstances and facts. Applying the test identified by McPherson JA in *R v Gray* (1998) 98 A Crim R 589, at 592–593, Lucas must have believed that what he did was the only way he could have saved himself or Meredith from the assault. Lucas must have held that belief 'on reasonable grounds'; but it is the existence of an actual belief to that effect on Lucas's part that is the critical or decisive factor. There is no additional requirement that the force Lucas used to save himself or Meredith must also be, objectively speaking, 'necessary' for the defence.

On the facts, it would appear that Lucas is well placed to successfully argue self-defence under the circumstances he faced from such a notorious underworld figure.

(2) Self-defence and mistake of fact for Lucas

> Would your answer differ if it transpires that Lucas is mistaken as to Ralph's being armed with a gun and in fact Ralph had neither a weapon on his person nor in the house?

The short answer to this supplementary question is 'no'.

In both Codes, self-defence focuses upon whether the person's belief that the force used is necessary is based on reasonable grounds. Thus, mistake comes under the umbrella of reasonable grounds, and self-defence remains available provided any mistake was reasonable. If the belief, even if mistaken, was based on reasonable grounds, the self-defence will itself have been reasonable.

(3) Self-defence and a pre-emptive strike for Meredith

> How would your answer differ on the availability of self-defence for Meredith if, instead of Ralph surprising the pair of lovers, Ralph had found out about the affair from an associate and told Meredith: 'You, I'll deal with later.' After which statement Ralph draws a bath. Meredith then takes pre-emptive action by picking up Ralph's gun, conveniently left on the

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> dressing table, and empties the contents of the chamber (six bullets) into Ralph's torso at point blank range as Ralph reclines in the bath.

Meredith's situation is on point with *R v Secretary* (1996) 5 NTLR 96. Meredith can rely on the statutory adoption of *R v Secretary* and *Osland v The Queen* (1998) 197 CLR 316 in that the harmful act need not be imminent in s 248(4)(a) of the *Criminal Code* (WA), and *Osland v The Queen* being followed by the Queensland Court of Appeal in *R v MacKenzie* [2002] 1 Qd R 410.

Expert evidence is admissible to explain that Ralph's abuse and threat to 'deal with later' bears on the reasonableness of Meredith's belief that it was necessary to avoid the risk of death or grievous bodily harm by taking pre-emptive action. Clearly, the actual history of the relationship between Meredith and Ralph would be highly relevant.

If Meredith was unable to rely on self-defence, then in Queensland if she can satisfy the test in s 304B (1)(b) of the *Criminal Code 1899* (Qld), which covers the partial defence of killing for preservation in an abusive domestic relationship, Meredith would be convicted of manslaughter rather than the murder of Ralph.

CONCLUSION

Lucas is likely to be able to rely on self-defence in both Queensland and Western Australia, and it would make no difference that Lucas was mistaken that Ralph was not armed.

Meredith may also be successful in relying on self-defence provided the expert evidence led on her behalf and the history of her relationship with Ralph is sufficiently strong. Failing this, in Queensland, Meredith would be well placed to come within the test in s 304B (1)(b) of the *Criminal Code 1899* (Qld), which covers the partial defence of killing for preservation in an abusive domestic relationship, and which has the effect of reducing murder to manslaughter.

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